

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Michael Trepanier,

Complainant,

vs.

ORDER FINDING
PROBABLE CAUSE

John Audette,

Respondent.

The above-entitled matter came on for a probable cause hearing as provided by Minn. Stat. § 211B.34, before Administrative Law Judge Kathleen D. Sheehy at 3:00 p.m. on November 1, 2004, to consider a complaint filed by Michael Trepanier on October 28, 2004. The hearing took place at the Office of Administrative Hearings, 100 Washington Square, 100 Washington Avenue South, Suite 1700, Minneapolis, Minnesota.

Steven E. Antolak, Esq., P.O. Box 43664, Brooklyn Park, MN 55443-0664, appeared on behalf of Michael Trepanier. Michael Trepanier also appeared at the hearing in person.

John Audette, 9231 Queens Garden, Brooklyn Park, MN 55443, appeared by telephone conference call because he indicated he was not able to appear in person.

Based on the record in this matter and for the reasons set out in the attached Memorandum, the Administrative Law Judge concludes that there is probable cause to believe that the Respondent violated Minn. Stat. § 211B.06 by making false statements in a piece of campaign material. Therefore, the Administrative Law Judge issues the following:

ORDER

1. That there is probable cause to believe that John Audette violated Minn. Stat. § 211B.06 by making knowingly false statements in campaign material; and

2. This matter is referred to the Chief Administrative Law Judge for assignment of a three-judge panel to conduct an evidentiary hearing.

Dated: November 3, 2004

/s/ Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

MEMORANDUM

Michael Trepanier is running for a seat on the Brooklyn Park City Council. He previously had been elected three times to the Brooklyn Park City Council, serving from the fall of 1996 to August 2001. He resigned several months into his third term. After Trepanier's resignation, Rand Haglund won a special election to fill that seat on the Council. Haglund is running for re-election, and Trepanier is now opposing him.

Trepanier has filed a complaint concerning a piece of campaign literature written by John Audette, a friend of and supporter of Haglund's. Audette printed 6,000 copies of a flyer and, as of the date of the probable cause hearing, had delivered 1,000 of them by hand to homes in the eighth and ninth precincts in Brooklyn Park.

The relevant section of the Fair Campaign Practices Act provides as follows:

A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.^[1]

1. With regard to the "headline" on the first page, which states that "**State Auditors Investigation: Brooklyn Park, MN** – Three incumbents do not seek reelection; Mike Trepanier resigns from City Council," Trepanier contends that the three individual statements are true but that they are unrelated to each other and that assembling them in the fake headline to suggest that they are related and were reported as being related is grossly misleading and intended to damage his reputation and standing in the community. In the text on the second page, the mailing provides that

Under Mike Trepanier's watch, the City budget exploded and spending was so out of control that the State Auditor investigated the City's spending with an extensive audit. The results were devastating. Things were so bad that the sitting Mayor and two other council members did not seek reelection and Trepanier quit just 3 months after being elected to his 3rd term.

It is true that (1) state auditors did investigate, (2) three incumbents did not seek re-election, and (3) Trepanier did resign, but Trepanier testified that his resignation had nothing to do with the audit. He has provided a copy of his resignation letter, dated May 25, 2001, in which he states that he resigned after receiving advice from the Public Employee Retirement Association (PERA) that service on the council would negatively impact his retirement benefits.^[2] He has also provided evidence from a former city

council representative and the former mayor that their decisions not to seek reelection had nothing to do with the audit.^[3]

Audette contends that his intent was not to suggest that Trepanier resigned because of the state auditor's investigation; rather, he says his intent was to convey the message that when Brooklyn Park most needed elected leaders, the elected leaders chose to quit.^[4] He maintains that the "ramifications of Mike Trepanier resigning were compounded by the State Auditor's report and the other elected officials not seeking reelection. So therefore, it seemed reasonable to combine the three elements because together they convey the message that each individually did not accurately convey."

The Administrative Law Judge finds that there is probable cause to believe that these are false statements with respect to the political character or acts of a candidate that are designed or tend to injure or defeat a candidate for election to a public office, that were intentionally prepared by a person who knew it was false or communicated it to others with reckless disregard of whether it is false, in violation of Minn. Stat. § 211B.06, subd. 1

2. With regard to the statement that "Trepanier Votes for Maximum Tax Levy; Results in Double Digit Increase," Trepanier contends that none of the five budgets he voted on between 1996 and 2000 had a double digit increase in either the levy rate or in actual tax revenue. He has provided data, which are taken from the city's certified annual financial reports, providing that there was no percentage tax increase in those years higher than 7.2%.

Audette provided evidence that in December 1998, Trepanier voted to approve a budget that certified the 1999 tax levy at the maximum.^[5] He also provides evidence that property taxes, which include levies from the school district, the county, the city, and other taxing authorities, had a double-digit increase in 1998.^[6] Audette had this data in hand when he prepared the flyer.

Again, Audette has taken two unrelated statements and linked them in a fake headline to suggest that Trepanier's action in voting on the levy rate resulted in a double-digit tax increase. The Administrative Law Judge finds that there is probable cause to believe that this is a false statement with respect to the political character or acts of a candidate that is designed or tends to injure or defeat a candidate for election to a public office, that was intentionally prepared by a person who knew it was false or communicated it to others with reckless disregard of whether it is false, in violation of Minn. Stat. § 211B.06, subd. 1

3. With regard to the statement in the text that "[h]e wants you to forget that he raised taxes on you every year he was in office," Trepanier maintains it is not true. He has provided data showing that the levy rates declined from 1996-97 and from 1999-2000.

Audette has provided evidence that property taxes in Brooklyn Park increased every year during Trepanier's tenure. Property taxes, however, are composed of levies of multiple taxing authorities, not just the city. The flyer states that Trepanier took action to raise taxes every year he was in office. The Administrative Law Judge finds that there is probable cause to believe that this is a false statement with respect to the political character or acts of a candidate that is designed or tends to injure or defeat a candidate for election to a public office, that was intentionally prepared by a person who knew it was false or communicated it to others with reckless disregard of whether it is false, in violation of Minn. Stat. § 211B.06, subd. 1.

5. With regard to the statement in the text that "[h]e wants you to forget that while he was in office, Brooklyn Park became the 2nd highest taxed city in the state and crime was out of control!" Trepanier contends based on information from the city finance director that Brooklyn Park has never been the second highest taxed city in the state, although he agrees it was ranked second in the metropolitan area for some period of time if all property taxes, not just the city portion, are included.

Audette provided evidence that he obtained this information from watching televised city council meetings and that he also recalled the same information being published in newspapers and magazines.^[7]

Although this is a closer question than the other statements, there is sufficient evidence to find probable cause that the statement in the flyer is false and made with reckless disregard for whether it was false.

Finally, Audette argues that he was prejudiced by the admission of evidence offered by Trepanier during the hearing, because he was not able to see it. Audette chose to participate in the hearing by telephone as opposed to appearing in person. He also stated that he did not have access to a fax machine to receive copies of the exhibits at the outset of the hearing, although he later said he thought he could receive faxes. To facilitate his participation in the hearing, the Administrative Law Judge read him the text of each exhibit as it was offered, and sustained objections to two of them.^[8] All of the exhibits were successfully faxed to him immediately after the hearing, and Audette was permitted to respond to the exhibits in writing by noon the next day, which he did (by fax). He was not prejudiced in any way by the receipt of Exhibits 1 and 3-5 at the hearing.

It is important to note Audette's testimony that Rand Haglund, Trepanier's opponent, asked Audette not to distribute the flyers. Audette disregarded this request. He maintains he distributed 1,000 flyers, by himself, on the evening of October 26, 2004. During the hearing he said he was not sure whether he would distribute the remaining flyers before the election.

K.D.S.

^[1] Minn. Stat. § 211B.06, subd. 1.

^[2] Exs. 1 & 3.

^[3] Exs. 4 & 5.

^[4] Ex. 8 at 2.

^[5] Ex. 8, Attachment A.

^[6] Ex. 8, Attachment B. The other double-digit increase in property taxes that Audette identified occurred from 1995 to 1996, before Trepanier's election to the city council.

^[7] Ex. 8 at 4.

^[8] Exhibits 6 and 7 were marked as an offer of proof but were not received in evidence.